

NO. 22223

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER MAGUIRE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in the one count indictment for transportation of a stolen motor vehicle in foreign commerce following a trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231 and 2312. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

The indictment was in one count only and charged that appellant

knowingly and intentionally transported a stolen motor vehicle in foreign commerce (C.R. 2).^{1/}

Jury trial commenced on May 25, 1967, before United States District Judge Fred Kunzel (C.R. 160, R. T. 80-81).^{2/} Appellant was found guilty on the same date and was sentenced on June 2, 1967, to the custody of the Attorney General for a period of five (5) years to run concurrent with a sentence appellant was then serving, and pursuant to Title 18, United States Code 4208 (a)(2) to be eligible for parole at such time as may be determined by the Board of Parole (C.R. 168).

III

ERROR SPECIFIED

Appellant specified the following points upon appeal:

QUESTIONS PRESENTED

- "1. Was sufficient warning given concerning constitutional rights, before interrogation by the Federal Authorities in compliance with the Miranda Doctrine?
- "2. Was sufficient warning given concerning constitutional rights, before interrogation by the United States Customs authorities in compliance with the Miranda and Dorado Doctrines?
- "3. Was sufficient warning given concerning constitutional

^{1/} "C.R." refers to the Clerk's Record on Appeal.

^{2/} "R.T." refers to the Reporter's Transcript of Proceedings.

rights , before interrogation after reaching the accusatory stage by California State Authorities in compliance with the Miranda and Dorado Doctrines?

- "4. Did the Court's Jury instruction fail to comply to the Miranda Doctrine?
- "5. Was inadmissible evidence obtained by a search of appellant's automobile immediately subsequent to arrest?
- "6. Was proper venue denied by the United States District Court , in and for the Southern District of California , resulting in inability to present an adequate defense?
- "7. Did the United States District Court effectively and unjustly deprive the appellant of his right to be confronted by his witness , which he had motion to be subpoenaed for his trial , especially the chief witness and only witness , which could show intent and establish whether a corpus delicti had been committed in violation of the Federal Statute of law?
- "8. Did the United States District Court effectively and unjustly deprive the appellant of his constitutional right of a speedy trial?
- "9. Did the United States District Court effectively and unjustly deprive appellant the right as counsel of his own defense of adequately preparing his defense by permitting

State Authorities at the San Diego County jail to violate Federal Court Order in confiscating, censoring, mutilating and destroying brief notes intended for use at his trial and was 'cruel and unusual punishment' inflicted by having him placed in a dark solitary confinement cell to deter appellant from preparing an adequate defense for a trial?

"10. Did the United States District Court effectively and unjustly deprive the appellant of effective and adequate representation of counsel for his defense and the right to have further counsel appointed of his own choice to defend his trial?

"11. Did the appellee effectively and unjustly deprive the appellant of his entire transcript of record, Volume I, to perfect his appeal?"

IV

STATEMENT OF THE FACTS

A. Legal preliminaries: On December 19, 1966, the appellant failed to appear for arraignment and plea, his bond was forfeited and a bench warrant issued for his arrest (R.T. 4). On February 27, 1967, the trial court agreed to change venue of the case to Maine if the appellant would stipulate to the facts which occurred in San Diego, California (R.T. 19). The stipulation appeared very fair to appellant's counsel (R.T. 27). During this period appellant was confined elsewhere after having been released on

his own recognizance by the Trial Court (R.T. 7, 9, 34). On May 8, 1967, appellant was arraigned, his plea entered and his motion for change of venue denied (R.T. 36-39). Appointed Counsel was relieved and appointed as stand-by Counsel at appellant's request (R. T. 34-36, 38-39). On appellant's motion for a speedy trial, trial was set for May 23 (R.T. 40-41). Appellant's motion to suppress was set for May 22 (R.T. 42-43). The trial court released materials to appellant for use in jail in connection with another appeal of appellant (R.T. 54-55). On May 23 appellant made a motion for continuance because he had been deprived of the use of his materials (Separate transcript, p. 2). Witnesses had been subpoenaed from Maine and were present and made available to appellant for interview (separate transcript, p. 11), and the appellant was given a continuance of two days to interview the witnesses and study his own statement, the car rental contract, and the statements of the witnesses, which had been provided by the government but taken from appellant by the jailer (separate transcript, and R. T. 61).

Appellant also requested a continuance because the witness who rented the car was not available (separate transcript, p. 12) and requested a change of venue on the above ground (R.T. 76). The government had subpoenaed said witness but was unable to locate him (R. T. 76-78, separate transcript, p. 12-13).

B. Trial: On October 7, 1966, in Maine, the Portland Auto Renting Company rented a blue Dodge Station Wagon, registration number 405-983, to a person giving the name "Galen Knowles" (R.T. 85-87). The automobile

was to be returned on October 8 and was reported stolen on that date (R.T. 89). The contract was signed for the company by Saul Arnold, who was no longer employed by the company, and the Assistant Treasurer, Mollie Weisman, did not know where he was (R.T. 90-91).

Glen Knowles identified exhibits 2-A through 2-I except for 2-B as cards lost by him the end of September or the middle of October, and noted that 2-H, his driver's license, had his birth date changed from 9-25-43 to 9-25-23 (R.T. 92-94). He testified he did not rent a 1964 Station Wagon and did not give appellant nor anyone else permission to rent a car in his name (R.T. 95). Nor did he give appellant or anyone else permission to use the exhibits (R.T. 95).

United States Customs inspector Cardwell testified appellant drove a 1964 Dodge Station Wagon with Maine plates from Mexico to the United States at San Ysidro, California, on November 11, 1966 (R.T. 99). Because of the appellant's attitude and behavior, he was referred to the inspection area (R.T. 100). Because of appellant's behavior, Inspector Cardwell thought appellant may have been smuggling some type of contraband (R.T. 101).

The San Diego police officer, Mr. Hammon, saw the appellant at the inspection area on November 11, 1966, and advised him of his constitutional rights (R.T. 103-105).

Out of the presence of the jury, both police officer Hammon and FBI agent Turnage testified they warned appellant of his constitutional rights and appellant testified they did not. The court ruled the admonitions conformed

to the law and that Hammon and Turnage did in fact give them (R.T. 105-128) . Appellant consented to the court's ruling on the entire matter of admonition (R.T. 127) .

Again, before the jury, officer Hammon testified he found the identification cards on the counter, that appellant stated his name was Galen Knowles, that the driver's license, draft card, and gas credit card, all in the name of Galen Knowles were his (R. T. 128-129). Officer Hammon also testified appellant stated the rental agreement (Government's Exhibit No. 1) was for the 1964 Dodge and that he (appellant) rented it (R.T. 129-130) .

Inspector Cardwell testified he had appellant put the contents of his pockets on the counter, but he (Cardwell) may have gotten the rental agreement out of the car (R.T. 131-132). He further testified he was making a regular custom's search and the appellant had zig-zag cigarette papers on him which made Cardwell suspect the presence of marihuana (R.T. 133) .

During questioning at the inspection area by Officer Hammon, appellant stated in reference to the contract (Government's Exhibit 1) that he rented the car, that he was not making rental payments at the time, that he was Galen Knowles, and when asked about the 100 mile restriction in the contract "just sat there and smiled" (R.T. 143-145). There were so many pieces of identification that the officer could not remember all the names (R.T. 147). Appellant stated he had found the credit cards and had allowed friends to use Harry Olson's (R.T. 148). Appellant's responses about the automobile were extremely vague (R.T. 149) .

The appellant was first questioned about 40 feet from the International

Boundary and was required to go from there to the inspection area (R.T. 151-153). The car registration or plates coincided with the rental agreement (R.T. 153-155).

When questioned by the FBI agent, appellant signed the waiver (Government's Exhibit 3) as "Galen E. Knowles" and then said his true name was Harold C. Gore (R. T. 156). He stated he had been using "Galen Earl Knowles" for approximately one and one-half months and that he got permission to drive to Boston, Massachusetts, from the rental agency (R.T. 156-157). He said he knew Knowles and that Knowles wouldn't press charges (R.T. 158).

The appellant did not testify at the trial (R.T. 16). Motion for Judgment of Acquittal was denied (R. T. 159).

V

ARGUMENT

A. SUFFICIENT WARNING OF HIS CONSTITUTIONAL RIGHTS
WAS GIVEN THE APPELLANT.

Appellant argues he was not given sufficient warning of his rights by either officer Hammon or F.B.I. Agent Turnage (Appellant's argument 1 and 3). The record indicates otherwise.

The San Diego police officer, George Hammon, advised the appellant before questioning him at the Customs inspection area. In fact, the first thing he did after entering the office and finding out the problem was to tell Mr. Maguire to remain silent so he could advise him of his constitutional

rights (R.T. 104-105). He then testified, "I explained to Mr. Maguire that he had a right to an attorney at this particular time if he chose so; he had a right to remain silent; he had a right not to answer any of my questions if he chose to do so; and that if Mr. Maguire couldn't afford an attorney, that the State would provide him one. And the defendant said he understood . . . this admonishment." (R.T. 105).

"I admonished the, Mr. Maguire, that he had a right to remain silent; didn't have to answer any of my questions. I advised Mr. Maguire that he had a right to an attorney - - then and now; at that time he had a right to an attorney; also I advised the, the, Mr. Maguire, that if he couldn't afford an attorney, that the State would provide him one free." (R.T. 109); and, "any statements that you make can and will be used against you in court by myself." (R.T. 110).

No question of voluntariness arose at the trial. (R.T. 110-111).

F. B. I. agent Turnage advised appellant pursuant to the written waiver form (Government Exhibit 3). This form was read to appellant (R.T. 113). It is interesting to note that appellant's statement to Turnage was made on November 14, 1967, three days after his arrest and the admonishments given by officer Hammon.

Thus, appellant was advised of his rights by two different officers of two different agencies, the San Diego police and the F. B. I., on two separate and distinct occasions.

Appellant's argument in this regard merely rehashes the credibility

of the officers which the trial court was in a much better position to analyse than this court. Furthermore, Government's Exhibit 3, a written document signed by the appellant clearly substantiates the officers.

Miranda v. Arizona, 384 U.S. 436 (1966), is not the open sesame that appellant seems to think. Its holding was summarized by the court as follows:

"To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But

unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (384 U.S. 436 at p. 478-479).

It is submitted that the record as quoted above and Government's Exhibit 3 show a definite compliance with Miranda, both as to the letter and the spirit thereof.

Appellant contends (appellant's argument 3, p. 15-16 of his brief) that Customs inspector Cardwell's questions at the international line when appellant sought entry to the United States violated his rights under Miranda. Yet no statements of appellant other than that he was a United States Citizen and that he had made no purchases (R.T. 100 and 101) was introduced at the trial. Even assuming that Miranda applies, which appears ridiculous, no objection to the introduction of the statements was made at the trial. It would appear that no objection was made because the appellant was in no-wise prejudiced by them, and certainly this court should not reverse if the appellant has not been prejudiced in some way at the trial. Thus, even if Miranda applies to Cardwell's questions, the error was harmless and harmless constitutional error does not require a reversal (Chapman v. California, 386 U. S. 18 (1967)).

In any event, from the record it is doubtful that Mr. Cardwell ever "interrogated" the appellant, at least insofar as beyond the normal routine of questions asked all persons seeking entry into the United States. No other evidence in that regard was elicited and Cardwell could not even

remember any questions beyond appellant's citizenship and purchases in Mexico (R.T. 101). It is apparent from the record that Cardwell's questions were to determine whether or not appellant should be referred to the inspection area or be allowed to proceed inland without further ado. If Miranda prevents these questions, then the United States Immigration and Customs services might as well close up shop. In fact, it is difficult to conceive of the Supreme Court holding that the qualifications in Miranda that the suspect be "in custody" or "otherwise deprived of his freedom in any significant way" would be applied to border situations where those seeking entry to the United States are stopped at the line and questioned preliminarily to determine if searches will be made. The Tariff Act of 1930 permits such searches (19 U.S.C. 1581(a)), and without such questions every vehicle and person entering the United States would have to be searched which would impose an intolerable burden not only on the Government but also on those seeking entry.

B. THE COURT'S JURY INSTRUCTIONS COMPLIED WITH THE
MIRANDA DOCTRINE.

Appellant argues that the court's jury instruction was erroneous (appellant's argument 4, brief p. 23-36). The court ruled (out of the presence of the jury) that the admonitions given by the officers conformed to law and that they were in fact given (R. T. 127). The appellant raised no question as to voluntariness of his statements (R. T. 110-111) and consented to the court ruling on the entire matter (R. T. 127), but nevertheless the court instructed the jury as follows:

"All evidence relating to any oral admission or oral confession or any oral incriminating statement claimed to have been made by the defendant outside of court should be considered with caution and weighed with great care.

"In this case there were such admissions or statements made by the defendant outside of court, and you are required - - strike that for the moment.

"The circumstances surrounding the making of such statements are subject to careful scrutiny in order to determine whether such statements were made by the defendant voluntarily and understandingly.

"If the evidence does not convince you beyond all reasonable doubt the statements were made voluntarily and understandingly, you should disregard them entirely. On the other hand, if the evidence does show beyond a reasonable doubt that the statements were in fact made voluntarily and understandingly, you should consider it as evidence. You shall consider the statements as evidence against the defendant." (R.T. 178-179).

The appellant in his argument 4 mistakenly assumes that the court gave the jury instruction discussed in the proceedings outside the presence of the jury during the voir dire of the officers (R.T. 125). That instruction was not given and so it doesn't matter whether it was correct or incorrect according to the "Miranda doctrine".

C. THE SEARCH OF APPELLANT'S AUTOMOBILE WAS LEGAL
AND THE RENTAL AGREEMENT FOUND THEREIN WAS
ADMISSIBLE.

Appellant argues that the evidence obtained through search of the automobile was inadmissible (argument 5, appellant's brief p. 26-36).

The automobile was searched at the Customs secondary inspection area at the border immediately after appellant had emptied his pockets at Customs Inspector Cardwell's request (R.T. 132). It was searched because appellant had a lot of baggage and Inspector Cardwell wanted to see what was inside (R.T. 132) and because appellant had zig-zag cigarette papers on him which made Cardwell suspect appellant may have had marihuana (R.T. 133). Appellant had been brought to the inspection area for a more thorough search because of his attitude and behavior in answering Cardwell's questions at the line (primary inspection area) (R. T. 100, 101).

Such searches are permitted by the Tariff Act cited above and pursuant to regulations empowered by 19 U.S.C. 1582 (19 C.F.R. 23.1). The constitutionality of customs searches under these provisions has been sustained (Murgia v. United States, 285 F.2d. 14, 9th Cir. 1960).

And if the search was legal, then the seizure of the documents, specifically the rental agreement (Government's Exhibit 1), was legal and hence admissible.

Warden, Maryland Penitentiary v. Hayden, 87 S. Ct. 1642 (1967)

Cooper v. California, 386 U. S. 58 (1967)

D. CONCLUDING REMARKS.

Due to the press of trial work, the government is unable to compete this brief within the time limits set, but in regard to appellant's remaining arguments so far unanswered herein, appellee has the following short concluding comments:

Venue (appellant's argument 6): Change of venue is discretionary with the trial court and the basic question is merely whether or not the appellant has been afforded due process of law. The record clearly indicates appellant was afforded due process and certainly the trial court did not abuse its discretion in denying the motion for the change of venue. It is clear from the record that the court actually desired to change venue but in the face of government opposition and lack of cooperation of the appellant felt compelled to deny the motion.

Confrontation of witnesses and opportunity to present an adequate defense (appellant's arguments 6 and 7): The "chief witness" appellant complains of as having been absent was, as is shown in the record, subpoenaed but not found. Furthermore, appellant was complaining about lack of speedy trial. What was the court to do - grant further continuances, hire detectives for the appellant, or what? The appellant was not only given zeroxed copies of his own statements prior to the trial, but also those of the contemplated government witnesses plus the opportunity to interview those who were brought out from Maine and forced to wait two days while appellant further "prepared" his case.

Speedy trial (appellant's argument 8): On the one hand the appellant demanded a speedy trial and on the other continuance to search for witnesses and prepare for trial.

The original delays were caused by appellant's "skipping" of bail and later his confinement elsewhere plus the various motions he made, in particular the motion for change of venue. He was finally arraigned on May 8, 1967, and his trial set for only two weeks later, May 23, 1967. In view of the Southern District's trial calendar, this was a speedy trial indeed.

Right to Counsel (appellant's argument 9 and 10): The record clearly shows the diligence of the court in supplying appellant with counsel and affording appellant an opportunity to not only have counsel but also to act in pro per with standby counsel and to have access to multitudinous materials at the jail.

Transcript (appellant's argument 11): As far as the government knows, appellant has been provided with the entire transcript of record.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



MOBLEY M. MILAM

